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English Commercial Court issues guidance on: (i) what constitutes an "award" (ii) whether a cross-claim under a difference ontract can fall within an arbitrator's jurisdiction, and (iii) the circumstances in which the Court will order compliance with a Peremptory Order

By Craig Tevendale and Liz Kantor

In the case of *RQP v ZYX*, the English Court has issued a jam-packed judgment on three important issues. In dismissing RQP's three applications, Mr Justice Butcher has provided guidance on the circumstances in which (i) an arbitrator's decision will constitute an "award" which is capable of being challenged under the English Arbitration Act (the **Act**); (ii) a cross-claim arising out of a separate contract falls within the scope of an arbitration clause and (iii) the Court will enforce a peremptory order under s42 of the Act.

Background

ZYX commenced a London-seated LCIA arbitration against RQP concerning various issues under a License Agreement. A complicated procedure ensued, centering around two main issues: "jurisdictional issues" and "security issues".

Jurisdictional issues

In its Response to the Request for Arbitration, RQP raised certain jurisdictional issues regarding whether some of the claims fell within the scope of the arbitration clause. In response, ZYX also made an objection to a cross-claim brought by RQP whereby it sought to set off sums owing from ZYX to RQP under a different agreement (the **Second Consultancy Agreement**) against any sums it owed to ZYX in this dispute.

In March 2021 during what he called a "Mid-Stream Case Management Conference" (**MSCMC**), the Sole Arbitrator gave some oral "comments" on RQP's jurisdictional objections. He subsequently sent an email to the parties stating that "*Because of the many intertwined issues, I made a point not to decide on jurisdictional objections at this stage and restricted myself to comment, and to a statement that the issues of jurisdiction will be dealt with as the arbitration continues*". In the same email, he also confirmed his oral comments in writing "*for the sake of good order*".

In late March 2021, RQP issued a claim under s67 of the English Arbitration Act (the **Act**) to set aside what it referred to as the "Arbitrator's Award on Jurisdiction".

Security issues

Separately but also in March 2021, ZYX made an application for security on the basis that RQP had been dissipating assets. In granting the application, the Sole Arbitrator ordered RQP to (i) issue a bank guarantee in favour of ZYX or make a deposit in the sum of over USD 10M as security for any future award issued in favour of ZYX and (ii) provide security for a future costs award in the sum of USD 250,000. RQP subsequently stated that it would not be able to make payment of the cash deposits or obtain the bank guarantees.

ZYX then sought a peremptory order under s41(5) of the Act to the effect that RQP should issue a bank guarantee or provide a deposit as security for a future award, as ordered by the Arbitrator.

The Arbitrator granted the order (the **Peremptory Order**).

However, in the meantime, RQP contended that it had learned of conduct on the part of ZYX which it said constituted a breach of the

arbitration agreement. Based on this contention, RQP terminated the arbitration agreement and did not provide the security. In spite of this, RQP still advanced its s67 application, but stated that it was doing so "*solely for the purpose of seeking a determination as to the scope of the Arbitrator's jurisdiction at the commencement of the Claim*".

The Arbitrator granted permission to ZYX to a make an application for enforcement of the Peremptory Order (under s42(2)(b) of the Act).

Decision

1. Was there an "award"?

It is established authority that the court does not have the power to review interlocutory decisions which are not awards (see *Republic of Uganda v Rift Valley Railways (Uganda)* [2021] EWHC 970 (Comm). Consequently, the first question for the court was whether the Arbitrator's comments at the MSCMC and his written follow-up constituted an "award".

Referring to the guidance in *ZCCM Investments Holdings v Kanshanshi Holdings PLC* [2019] EWHC 1285 (Comm), Mr Justice Butcher made the following comments on awards versus interlocutory decisions:

- The Court will look at substance over form. However, the arbitral tribunal's own description of the decision is relevant, though not conclusive.
- It is relevant to look at how the reasonable recipient would have reviewed the decision, considering the objective attributes of the decision. Mr Justice Butcher also formed the view that a reasonable recipient would consider whether the decision complies with the formal requirements for an award under any applicable rules, and that it must be assumed that the reasonable recipient had all the information available to the parties and tribunal when the decision was made.
- Factors in favour of a decision being an award are if the decision (i) is final in the sense that it disposes of the matters submitted to arbitration so as to render the tribunal "functus officio" (i.e, their mandate has expired in relation to the relevant issue addressed by the decision), and (ii) deals with the substantive rights and liabilities of the parties rather than purely procedural issues.

Based on these factors, Mr Justice Butcher concluded that there was no award, given that the Arbitrator (i) had specifically stated that he was only making preliminary comments (ii) did not comply with the formal requirements for an award under the LCIA rules and (iii) did not call the decision an award. It was therefore not necessary to consider the detail of the s67 challenge.

2. Did the cross-claim fall within the jurisdiction of the arbitrator?

Even though there was no award, the judge still went on to consider (on an obiter basis) whether RQP's cross-claim, which was essentially a " set-off", fell within the arbitration clause. This involved considering whether it was a "transaction set-off" (a cross-claim arising out of the same or closely-related transaction) or an "independent set-off" (which does not require any relationship between the transactions out of which the cross-claims arise). The judge added that a transaction set-off was an equitable set-off which usually meant that it was necessary to show that it would be manifestly unjust to enforce a payment without taking into account the cross-claim.

Based on the facts, the judge expressed the view that the cross-claim was not sufficiently closely connected with the claim, because: (i) it arose out of a separate agreement with an inconsistent jurisdiction clause (ii) the two agreements were between different parties and the Second Consultancy Agreement was entered into more than 2 years before the License Agreement and (iii) it was not manifestly unjust to consider ZYX's claim without taking into account the cross-claim.

3. Enforcement of peremptory order under s42 of the Act

As a preliminary point, the judge needed to consider whether the word "tribunal" in s42 of the Act could include a tribunal whose jurisdiction is

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subject to challenge. The judge concluded that it could. A key factor on which the judge based his decision was that it is open to a tribunal to defer a decision on its jurisdiction to an award on the merits, but it may still need to ask the court to make an order requiring compliance with a peremptory award.

The judge then went on to conclude that it was appropriate to make an order under s42 in this case. The starting point was that the court will generally seek to support the arbitral process and will not ordinarily seek to review the decision of the arbitral tribunal. Moreover, the Peremptory Order was appropriate in this case because:

- The order was made in response to non-compliance with an order which had persisted for a considerable length of time (from August 2021 to October 2022).
- RQP's contention that it did not have the money to pay was explicitly considered by the Arbitrator and indeed was the reason given for ordering security in the first place.
- There had been no material change of circumstances since the Arbitrator made the order, despite RQP's protestations of impecuniosity.

As a final point, the judge needed to consider RQP's argument that the Arbitrator no longer had jurisdiction given the repudiatory breach it contended, which, RQP argued, was a material change in circumstances. The judge concluded that the fact that the jurisdiction of the tribunal was contested was not of itself a good reason to refuse an order under s42, as there are other circumstances where the court can make orders which seek to support the arbitral process even where jurisdiction is contested, such as under sections 70(6), 70(7) and 67 of the Act.

Comment

All three of these decisions are consistent with the principle of judicial minimalism – the courts will only interfere in an arbitration to the extent necessary to support the arbitral process. That includes giving short shrift to attempts to circumvent procedural orders and decisions. In doing so, the court provided useful guidance on the distinction between orders on the one hand (which cannot be challenged on the basis of lack of jurisdiction or enforced under the New York Convention) and awards on the other.

This case is also a rare but important example of both the willingness on the part of arbitrators to grant security for claim in appropriate circumstances and the use of s42 of the Act by the courts to ensure that orders (rather than awards) still bite. Indeed, the Law Commission's consultation paper on the English Act asks whether s42 could be a means of enforcing emergency arbitrator orders too, such that this provision may receive greater attention in future.

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For more information, please contact Craig Tevendale, Partner, Liz Kantor, Professional Support Lawyer, or your usual Herbert Smith Freehills contact.

About the authors

Craig Tevendale
Craig leads Herbert Smith Freehills' international arbitration group in London. He also has extensive experience in litigation, expert determination and mediation with a particular focus on disputes in the energy, leisure, construction, engineering, defence and telecommunications industries. His practice comprises multi-jurisdictional work subject to a wide range of governing laws. Craig has acted in arbitrations as counsel, advocate and arbitrator in ad hoc proceedings and before all of the major arbitral institutions. His broader contribution to the arbitral community includes appointments to the ICC UK National Committee for Arbitration, to the ICC Commission upon the nomination of the ICC UK National Committee, and to the Advisory Committee of the Cairo Regional Centre for International Commercial Arbitration (CRCICA), and Deputy Chairman at the Advisory Committee to the Oman Arbitration Centre (OAC).

Liz Kantor
Liz is an experienced international arbitration lawyer and solicitor advocate. She was admitted as a solicitor in England and Wales in September 2011 after completing her training contract at Herbert Smith Freehills LLP. Liz has spent her entire career in the international arbitration team at Herbert Smith Freehills LLP, in both the London and Singapore offices. She extensive experience of acting as counsel in large and complex international commercial and investment treaty arbitrations under all the major arbitration institutions. She recently became a professional support lawyer for the Herbert Smith Freehills LLP global arbitration team.